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No. 414

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Supreme Court of the United States

OCTOBER TERM—1965

In the Matter
of
IRA HAUPT & CO.,
a Limited Partnership,
Bankrupt,

BERNARD KLEBANOW, GEORGE LEWIS, MICHAEL SLOAN and HAROLD L. MARANTZ, KENNETH ALAN MARANTZ and EDITH LEE MARANTZ, as Executors of the Estate of Charles Marantz,
Petitioners,

LAZARUS S. HEYMAN,
Petitioner,

THE CHASE MANHATTAN BANK and MANUFACTURERS HANOVER TRUST COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

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In the Matter
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IRA HAUPT & Co.,
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BERNARD KLEBANOW, GEORGE LEWIS, MICHAEL SLOAN and HAROLD L. MARANTZ, KENNETH ALAN MARANTZ and EDITH LEE MARANTZ, as Executors of the Estate of Charles Marantz,
Petitioners,

LAZARUS S. HEYMAN,
Petitioner,

THE CHASE MANHATTAN BANK and MANUFACTURERS HANOVER TRUST COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in the above entitled case on April 6, 1965. Petition for rehearing was denied on May 6, 1965.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the referee in bankruptcy (A 13-A 28)* is unreported and is printed in Appendix B

*"A" refers to the Appendix record on appeal in the court below in 343 F. 2d 726.

hereto, *infra*, p. 22b. The opinion of the District Court (A 5-A 12), printed in Appendix B hereto, *infra*, p. 13b, is reported in 234 F. Supp. 167. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 4b, is reported in 343 F. 2d 726.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 6, 1965, p. 3b, *infra*. Rehearing was denied on May 6, 1965, pp. 1b-2b, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where a bankrupt is a limited partnership, are its limited partners, who are also its creditors, automatically disenfranchised from voting their claims in the election of a trustee in bankruptcy by the provisions of Section 44a of the Bankruptcy Act, 11 U.S.C. § 72(a), which is printed in Appendix A, *infra*, at p. 1a.

STATUTE INVOLVED

The statutory provision involved is Section 44a of the Bankruptcy Act, 11 U.S.C. § 72(a). It is printed in Appendix A, *infra*, at p. 1a.

STATEMENT

Ira Haupt & Co. (hereinafter "Haupt") is a limited partnership which was formed, pursuant to the provisions of Article 8 of the New York Partnership Law, 38 McKinney's Consolidated Laws of New York (A 13). It had 16 general partners and 13 limited partners (A 13).

Haupt found itself in dire financial straits on November 18, 1963 (A 13). It was suspended on November 20, 1963 by the New York Stock Exchange (hereinafter the "Exchange") (A 5, A 17). By November 25, 1963, its assets were over $25,000,000 less than its liabilities (A 6, A 17).

On March 23, 1964, an involuntary petition in bankruptcy was filed against Haupt by Bernard Klebanow, George Lewis and Michael Sloan, three of the petitioners here who were also limited partners of Haupt (A 7, A 14).

A petition for an arrangement under Chapter XI of the Bankruptcy Act was thereupon filed, purportedly on behalf of Haupt, by six of its general partners, on March 30, 1964 (A 14).

The matters were referred to Honorable Edward J. Ryan, Referee in Bankruptcy, by order dated March 30, 1964.

On April 9, 1964, Bernard Klebanow, George Lewis and Michael Sloan, the three petitioning creditors in the involuntary proceeding, moved for an order dismissing the petition under Chapter XI (A 14).

The Referee, at the first meeting of creditors on April 27, 1964, pursuant to Section 338 of the Bankruptcy Act, conducted an election of a trustee who would be appointed by the court in case it should become necessary to administer the estate in bankruptcy.

Petitioners herein, limited partners of Haupt, sought to vote claims aggregating $1,795,861.15.

Claim of:	Amount
1) Bernard Klebanow	$418,093.42 as a general creditor $93,171.39 as a customer creditor*
2) George Lewis	$262,214.80 as a general creditor $56,600.12 as a customer creditor
3) Michael Sloan	$367,431.62 as a general creditor $23,247.80 as a customer creditor
4) Harold L. Marantz as Executor	$261,941.34 as a general creditor $50,660.66 as a customer creditor
5) Lazarus S. Heyman (A 22).	$262,500.00 as a general creditor

* Klebanow's proof of claim, which is typical of that filed by each petitioner, appears at A 45-A 50.

Certain banks objected to the voting of these claims solely on the ground that Section 44a of the Bankruptcy Act disenfranchished limited partners from voting claims as creditors (A 41-A 42).

The referee in bankruptcy, in an opinion dated June 10, 1964, sustained this objection (A 22-24) and on June 26, 1964 signed and filed an order implementing that decision (A 29-A 33). The referee in bankruptcy also dismissed the Chapter XI proceeding (A 32).

Upon a petition for review, the District Court, in an opinion filed on August 11, 1964, affirmed the ruling of the referee in bankruptcy, holding that the limited partners were barred from voting (A 5-A 12) not only by Section 44a of the Bankruptcy Act but also on equitable principles (which the referee in bankruptcy had not found) on the theory that the policy of the disenfranchising provisions of Section 44a is to prevent the election of a trustee who may be too closely related to the bankrupt and thus impair the vigorous defense of the creditors' interests (A 10-12). The District Court ruled that petitioners were barred merely because of the fact that they were limited partners and that their disability "encompassed all of their claims, whether as general creditors or customer creditors . . ." (A 12).

The court below, in affirming the District Court's order, stated in its opinion that (Appendix B, p. 8b, *infra*):

> "The sole question brought before us on the instant appeal is the validity of the order upholding the referee's disallowance of appellants' voting claims, on the ground that limited partners were intended by Congress to be disfranchised by the provisions of § 44(a) of the Bankruptcy Act. We hold that this ruling was correct and affirm the order of the District Court."

Section 44a of the Bankruptcy Act, insofar as it is relevant, provides:

> "The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members,

its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall, at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate."

REASONS FOR GRANTING THE WRIT

1. The question presented is of importance in the administration of the federal bankruptcy law.

The decision of the court below disenfranchises all limited partners from voting claims in the bankruptcy of their limited partnership. The question is one of first impression and has never before been decided.

The decision below adds to those disenfranchised by Congress in Section 44a of the Bankruptcy Act a category of persons not referred to therein. The decision below thus conflicts with the basic statutory policy of the Bankruptcy Act that trustees in bankruptcy are to be elected by all of the creditors other than those expressly debarred from voting. The decision below, in holding as it did, and in ignoring the policy of the Act is contrary to the principle enunciated by the Court below in *Schwartz* v. *Mills*, 192 F. 2d 727 (2d Cir. 1951).

2. The decision of the court below is clearly in error because the right to vote in bankruptcy proceedings involving limited partnerships is governed not by Section 44a of the Bankruptcy Act but by Section 5c which does not contain any disenfranchisement provisions. Section 5c thus provides:

"c. The creditors of the bankrupt partnership shall appoint the trustee, who shall be the trustee of the individual estate of a general partner being administered in the proceeding: *Provided, however,* That the creditors of a general partner adjudged a

> bankrupt may, upon cause shown, be permitted to appoint their separate trustee for his estate. In other respects, so far as possible, the partnership estate shall be administered as herein provided for other estates."

Section 44a is applicable only in bankruptcies involving single individuals and corporations. Under Section 1(8) of the Act, corporations "shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument."

Section 44a thus applies in bankruptcy proceedings involving (i) bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and (ii) associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee wherein beneficial interest or ownership is evidenced by certificate or other written instrument.

Haupt concededly is not (i) such a body or (ii) such an association, etc.

Haupt is a New York partnership, and therefore does not have the powers and privileges of private corporations not possessed by individuals or partnerships. So also, Haupt, a New York limited partnership, is not one in which "the capital subscribed [is] alone responsible for the debts. . . ." Haupt's general partners (like the general partners of all New York limited partnerships) are liable for all partner-

ship debts. (Sections 98, 26 and 90 of the New York Partnership Law (38 McKinney's Consol. Laws of New York).*

As stated in BLACK, A TREATISE ON THE LAW AND PRACTICE OF BANKRUPTCY § 240 at 328-29 (4th ed.):

> "A limited partnership is 'a partnership consisting of one or more general partners, jointly and severally responsible as ordinary partners, and by whom the business is conducted, and one or more special partners, contributing in cash payments a specific sum as capital to the common stock, and who are not liable for the debts of the partnership beyond the fund so contributed.' If the statute authorizing the formation of such concerns goes no further than this, it is evident that the association could not be brought within the definition of a 'corporation' in the bankruptcy law, nor could it even be regarded as an 'unincorporated company.' For all purposes of bankruptcy law it is simply a partnership and nothing more. But in some of the states, the laws provide that a 'limited partnership' or 'joint stock association limited,' may be organized by a certain number of persons, who subscribe and contribute capital thereto, 'which capital shall alone be liable for the debts of such associations,' thus bringing them exactly within the terms of the bank-

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* "§ 98. *Rights, powers and liabilities of a general partner*

"(1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that [the exceptions are not applicable here] . . . ."

"§ 26. *Nature of partner's liability*

"All partners are liable

"1. Jointly and severally for everything chargeable to the partnership under sections twenty-four and twenty-five.

"2. Jointly for all other debts and obligations of the partnership; . . ."

"§ 90. *Limited partnership defined*

"A limited partnership is a partnership formed by two or more persons under the provisions of section ninety-one, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership."

> ruptcy act. Such, for example, is the statute of Pennsylvania [citing Laws Penna. 1874, c. 153, p. 271]. . . ."

See also to the same effect, 2 CAVITCH, BUSINESS ORGANIZATIONS §§ 28.09, 28.10 at pp. 388-90 and Chapter 40, at pp. 1101-1112, especially § 40.08 at p. 1112 (1963).

Judge Palmieri's affirmance of Referee Ryan's decision on this question was based on the erroneous assumption that the disenfranchising provisions of Section 44a had been part of the Bankruptcy Act prior to 1938 and that when the definition of "corporations" in Section 1(8) was amended in 1938 to exclude limited partnerships, Congress did not intend thereby to change Section 44a. See his opinion below at A 10-A 12, Appendix B, *infra* at pp. 19b-21b.

However, prior to 1938, Section 44a contained no disenfranchisement provisions. When the definition of "corporations" in Section 1(8) was amended in 1938 to exclude limited partnerships, Congress for the first time inserted the disenfranchisement provisions into Section 44a. In other words, contrary to Judge Palmieri's assumption, there never was a time when the disenfranchisement portion of Section 44a was applicable to limited partnerships.

3. Although the court below stated that the only issue was whether petitioners were disenfranchised by Section 44a of the Bankruptcy Act, it proceeded, by way of *dictum*, to advance a number of other reasons why they should not be permitted to vote. These other reasons were that petitioners, limited partners, were really only investors (much as stockholders of a corporation) and that they were too likely to be closely affiliated with the interests of former management to be permitted to participate in the choice of a trustee to represent the interests of ordinary creditors.

The court below overlooked that each petitioner has a claim not only for his contract capital, which was at the risk of the business, but also as a customer, for securities on deposit with Haupt which were not at the risk of the business and which were not returned to him (A 45-A 50).

As to this latter aspect of his claim, each petitioner, under Section 102 of the New York Partnership Law, (38 McKinney's Consol. Laws of New York) had a right to be treated *pro rata* with other creditors. Section 102 of the New York Partnership Law expressly provides that a limited partner "may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets."

Neither § 5g of the Bankruptcy Act nor any provision of the New York Partnership Law nor of the Haupt partnership agreement provides that claims of limited partners which are not part of contract capital and are not at the risk of the business may not share *pro rata* with other creditors.

Furthermore, the *dictum* of the court below that petitioners should be disqualified on the theory that, as limited partners, they are too closely associated with the management of the bankrupt has no basis in the Bankruptcy Act and, indeed, is contrary to the decision of the court below in *In re Freeport Italian Bakery, Inc.*, 340 F. 2d 50 (2d Cir. 1965) wherein it was held (340 F. 2d at p. 54):

> "Potential conflicts of interest do not of themselves disqualify creditors from being appointed trustees in bankruptcy, even when they have already acted as a receiver, assignee for the benefit of creditors, or reorganization trustee, i. e., in capacities in which they must account to the bankruptcy court for their stewardship of the bankrupt's estate. In the Matter of G. E. C. Securities, Inc., 331 F. 2d 655 (2d Cir. 1964); In the Matter of Eloise Curtis, Inc., 326 F. 2d 698 (2d Cir. 1964). See also Schwartz v. Mills, 192 F. 2d 727, 29 A. L. R. 2d 1161 (2d Cir. 1951). The fact that Dominick Cataldo is a nephew-in-law and cousin of the two presidents of the bankrupt corporation *does not of itself disqualify Cataldo from voting for or being appointed as trustee*". (Emphasis added.)

The fact is that the referee below did not make any finding that the petitioners herein were too closely affiliated or likely to be too closely affiliated with Haupt's management. As appears from his opinion (A 13-A 28), he ruled that petitioners could not vote their claims as creditors (and he treated them as having claims as creditors) only because he found that Section 44a of the Bankruptcy Act disenfranchised them.

Indeed, there was no objection to the voting by the petitioners of their claims on the ground that they were too closely associated with management (A 34-A 44). It is thus apparent that the only ground for disenfranchising the petitioners here was a holding that, as a matter of law, *any* limited partner is too closely affiliated with the management of his limited partnership to be allowed to vote for its trustee in bankruptcy. A holding of this breadth, made completely without statutory foundation, should not be allowed to stand without the review of this Court.

Moreover, the relationship of petitioners to the management of Haupt is not at all the relationship of stockholders to the management of a corporation. Petitioners' interests are antagonistic to those of management, i.e., the general partners. Petitioners have personal claims against the general partners resulting from the fact that securities owned by them as customers were not returned. And, even in regard to their contract capital position, petitioners' interests are not similar to those of a stockholder. A stockholder has no rights against management for the repayment of his investment whereas petitioners do have claims against the general partners of Haupt personally for contract capital. See A 55 and Sections 98, 26 and 90 of the New York Partnership Law (38 McKinney's Consol. Laws of New York), *supra*, at p. 7. So also, stockholders of a corporation have a vote, elect management and therefore have a voice in the management of the affairs of their corporation. Under the New York Partnership Law and under the Haupt agreement of limited partnership, petitioners possessed no voice in the

management of the affairs of the partnership. See New York Partnership Law, §§ 98, 99, 96 and 115 (38 McKinney's Consol. Laws of New York).

The equities here are at least as strongly against disenfranchisement of the limited partners as they were in *In re Sabath and Strobing, Inc.*, 192 F. Supp. 237 (S.D.N.Y. 1961), where a non-voting stockholder of the bankrupt corporation, who came within the literal prohibition of Section 44a, was permitted to vote for a trustee in an election conducted in Chapter XI proceedings. If a non-voting stockholder is not disenfranchised, then *a fortiori* a limited partner who has no right to participate in the management of the affairs of a limited partnership should not be barred from voting his claims.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAX FREUND
Counsel for Petitioners
Bernard Klebanow, et al.

ABRAHAM M. GLICKMAN
Counsel for Petitioner
Lazarus S. Heyman

APPENDIX A

STATUTORY PROVISIONS CITED AND QUOTED

Bankruptcy Act, Section 44a

The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall, at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee so appointed fails to qualify as herein provided, the court shall make the appointment. If the bankrupt is a face-amount certificate company, as defined in section 4 of the Investment Company Act of 1940, the court alone shall make the appointment; but the court shall not make such appointment without first notifying the Securities and Exchange Commission and giving it an opportunity to be heard.

Bankruptcy Act, Section 1(8)

§ 1. Meaning of Words and Phrases. The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: "

(8) "Corporation" shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument.

APPENDIX B

JUDGMENT, ORDERS AND OPINIONS BELOW

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BERNARD KLEBANOW, GEORGE LEWIS, MICHAEL SLOAN and HAROLD L. MARANTZ, KENNETH ALAN MARANTZ and EDITH LEE MARANTZ, as Executors of the Estate of CHARLES MARANTZ, and LAZARUS S. HEYMAN,

Appellants,

THE CHASE MANHATTAN BANK and MANUFACTURERS HANOVER TRUST COMPANY,

Appellees.

In the Matter

of

IRA HAUPT & Co.,
a Limited Partnership,

Bankrupt.

Petition for Rehearing

ROSENMAN COLIN KAYE PETSCHEK & FREUND, New York, N. Y., for appellants Bernard Klebanow et al.

ABRAHAM M. GLICKMAN, New York, N. Y., for appellant Lazarus S. Heyman.

Petition for rehearing denied.

S. R. W.
J. J. S.
R. P. A.
U. S. C. JJ.

MAY – 6 1965

Appendix B

ORDER DENYING PETITION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BERNARD KLEBANOW, GEORGE LEWIS, MICHAEL SLOAN and HAROLD L. MARANTZ, KENNETH ALAN MARANTZ and EDITH LEE MARANTZ, as Executors of the Estate of Charles MARANTZ, and LAZARUS S. HEYMAN,
Appellants,

THE CHASE MANHATTAN BANK and MANUFACTURERS HANOVER TRUST COMPANY,
Appellees.

In the Matter
of
IRA HAUPT & Co.,
a Limited Partnership,
Bankrupt.

Petition for Rehearing In Banc

ROSENMAN COLIN KAYE PETSCHEK & FREUND, New York, N. Y., for appellants Bernard Klebanow et al.

ABRAHAM M. GLICKMAN, New York, N. Y., for appellant Lazarus S. Heyman.

No active circuit judge having requested that the case be reheard in banc, Judge Lumbard not participating in the consideration of the petition, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

MAY – 6 1965

Appendix B

THE JUDGMENT REVIEW OF WHICH IS SOUGHT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of April one thousand nine hundred and sixty-five.

Present: Hon. STERRY R. WATERMAN, Hon. J. JOSEPH SMITH, Hon. ROBERT P. ANDERSON, *Circuit Judges.*

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO
Clerk

Appendix B

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 312—September Term, 1964.

(Argued January 26, 1965 Decided April 6, 1965.)

Docket No. 29310

BERNARD KLEBANOW, GEORGE LEWIS, MICHAEL SLOAN and HAROLD L. MARANTZ, KENNETH ALAN MARANTZ and EDITH LEE MARANTZ, as Executors of the Estate of Charles Marantz, and LAZARUS S. HEYMAN,
Appellants,

THE CHASE MANHATTAN BANK and MANUFACTURERS HANOVER TRUST COMPANY,
Appellees.

In the Matter
of
IRA HAUPT & Co., a Limited Partnership,
Bankrupt.

Before: WATERMAN, SMITH and ANDERSON, *Circuit Judges.*

Appeal from so much of an order of the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge,* as dismissed petitions of

Appendix B
Opinion of the Court of Appeals

limited partners of Ira Haupt and Co., bankrupt, for review of order of referee in bankruptcy holding limited partners ineligible to vote in the election of a trustee. Affirmed.

MAX FREUND, New York, N. Y. (Rosenman Colin Kaye Petschek & Freund, on the brief), *for appellants Klebanow, Lewis, Sloan and Marantz.*

ABRAHAM M. GLICKMAN, New York, N. Y., *for appellant Heyman.*

WILLIAM E. JACKSON, New York, N. Y. (Francis H. Musselman, Samuel R. Ballin, Arthur W. Rashap and Milbank, Tweed, Hadley & McCloy, New York, N. Y., on the brief), *for appellee Chase Manhattan Bank.*

HENRY LANDAU, New York, N. Y. (Horace J. McAfee and Simpson Thacher & Bartlett, New York, N. Y., on the brief), *for appellee Manufacturers Hanover Trust Co.*

LEONARD ZALKIN, New York, N. Y. (Zalkin & Cohen, New York, N. Y., on the brief), *for First National City Bank and Morgan* Guaranty Trust Co.

SMITH, *Circuit Judge*:

On March 23, 1964, Klebanow, Lewis, and Sloan, three of the limited partners of Ira Haupt & Co., a New York Stock Exchange member firm, filed an involuntary petition in bankruptcy against Ira Haupt & Co. A week later, on March 30, the six general partners of Haupt filed a petition

for an arrangement under Chatper XI of the Bankruptcy Act, alleging that they represented the concern. After hearings on the desirability of a Chapter XI proceeding, Referee Ryan, before deciding on the Chapter XI request, went ahead with an election for a tentative trustee in bankruptcy, and on April 27 disallowed, so far as voting for trustee was concerned, the claims that the limited partners attempted to vote, totaling $1,795,861.15, and claims sought to be proved by the appellee banks and others, totaling $11,398,174.61, and permitted, for voting purposes, only the one claim of an Oliver Lundquist for consultive services in the amount of $19,000. Mr. Lundquist voted for one Edward Feldman. Referee Ryan dismissed the petition of the general partners and the proceedings under Chapter XI, denied a motion to stay his order, adjudged Haupt a bankrupt, and confirmed the election of Edward Feldman as trustee of the bankrupt, all by an order dated June 26, 1964.

The limited partners filed petitions for review, challenging the referee's decision that they could not vote for a trustee and his confirmation of Edward Feldman as trustee. The law firms of Krause, Hirsch, Gross & Heilpern, and Delson and Gordon, purporting to act for Haupt itself, filed a petition to review the June 26 order of Referee Ryan dismissing the Chapter XI proceeding. These several petitions to review were heard by Judge Palmieri.

On August 11 Judge Palmieri affirmed Referee Ryan, holding that the Chapter XI proceedings were properly dismissed on the ground that "Haupt" had no power or right to initiate that move, that Feldman was properly nominated the trustee in bankruptcy, and that the referee properly disallowed the above mentioned claims.

There have been several appeals from Judge Palmieri's opinion and order. Now before us is the appeal of the limited partners challenging the affirmance of Referee

Appendix B
Opinion of the Court of Appeals

Ryan's order wherein he rejected the claims of the limited partners and confirmed Feldman's election as trustee.

The Haupt partnership agreement provided that it should terminate on December 31, 1963. However, on November 18 Haupt was wiped out in the notorious DeAngelis vegetable oil debacle; three days later it was suspended by the New York Stock Exchange; and by November 25 it had $25,000,000 less assets than it had liabilities. Strong measures were taken; the Exchange itself agreed to contribute up to $12,000,000 to preserve its own reputation, and the banks agreed to subordinate their indebtedness owed to them in excess of $33,000,000 to the extent of the $12,000,000 advanced by the Exchange and up to another $12,000,000 if that amount was necessary to pay off customers whose securities were in the hands of Haupt at the time of the crash, i.e., the fiduciary claims. Apparently the limited partners were not parties to all these arrangements, but all the general partners were, including one Kamerman, who was designated under the partnership agreement as the sole managing and liquidating partner. Kamerman was now made responsible, as of November 1, 1963, for the orderly liquidation of the partnership within a two months' period although the partnership agreement, when made, had never contemplated any liquidation in November and December except a voluntary one of a sound financial organization.

Litigation over the authority of Kamerman and the general partners, prior to the individual bankruptcies of some of them, to act for the entire copartnership, the authority of the banking group as assignees, prior to the bankruptcy of the copartnership, as well as the authority of the trustee and of the limited partners to act through the trustee or adverse to his interests, is on appeal in this court. Additionally, in a case in which two of the limited partners sought to bring an action against the Exchange and Kamer-

man, reversing on appeal an order of Judge Tyler, *Klebanow* v. *N. Y. Produce Exchange,* 232 F. Supp. 965, in Docket No. 29270 this court upheld their standing to sue on behalf of the partnership. —— F. 2d ——, 2 Cir. 1965.[1]

The sole question brought before us on the instant appeal is the validity of the order upholding the referee's disallowance of appellants' voting claims, on the ground that limited partners were intended by Congress to be disfranchised by the provisions of § 44(a) of the Bankruptcy Act. We hold that this ruling was correct and affirm the order of the District Court.

Section 44(a) provides that the creditors of the bankrupt, "exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies," shall have the right to appoint one or three trustees for the estate. The word "corporation" is defined in § 1(8) to include among other things, "partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association." The problem arises here because Ira Haupt & Co., while obviously not a corporation, is not a partnership association of the kind specifically defined in the Act, since the general partners are personally liable for the debts of the partnership.

It is true, therefore, as appellants contend, that limited partners are not included within the literal language of the disfranchisement section. However, for this court to hold them not included in its terms would be inconsistent

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[1] In the meantime, after Judge Palmieri's decision, at least two of the general partners filed individual bankruptcies, and Professor Seligson is the trustee in those individual bankruptcies. Something was said on argument that he was acting as trustee of "Haupt." This does not appear from the appendices before us.

with the scheme of § 5g of the Act[2] as well as with the New York Partnership Law and Section 20 of the limited partnership agreement. Section 5g treats the general and limited partners alike and distinguishes their claims from the "partnership debts." To say now that for the purpose of electing the trustee the limited partners are to be treated as general creditors would mean, in many cases, that the limited partners would be able to elect a trustee partial to their interests and, by virtue of the priorities established by § 5g, necessarily adverse to the interests of the general creditors. Secondly, Section 20 of the agreement makes the debts and liabilities of the partnership to the general creditors superior to those of the limited partners; accordingly, as was true with § 5g, the general creditors are entitled to elect a trustee who is not in any position adverse to their interests. And, finally, the New York Partnership Law[3]

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[2] § 5g. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each general partner to the payment of his individual debts. Should any surplus remain of the property of any general partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be distributed among the individual partners, general or limited, or added to the estates of the general partners, as the case may be, in the proportion of their respective interests in the partnership and in the order of distribution provided by the laws of the State applicable thereto.

[3] New York Partnership Law §§ 98, 99 and 112 provide as follows:

§ 98. Rights, powers and liabilities of a general partner

(1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

(a) Do any act in contravention of the certificate.

(Footnote continued on next page)

clearly differentiates between creditors' claims and investors' interests.

In *Klebanow* v. *N. Y. Produce, supra,* this court held that on allegations of futility of demand on the partnership or liquidating partner, the limited partners of Haupt have

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(b) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(c) Confess a judgment against the partnership.

(d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose.

(e) Admit a person as a general partner.

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate.

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

§ 99. Rights of a limited partner

(1) A limited partner shall have the same rights as a general partner to

(a) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them.

(b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and

(c) Have dissolution and winding up by decree of court.

(2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in sections one hundred and four and one hundred and five of this article.

§ 112. Distribution of assets

(1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(a) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners.

(Footnote continued on next page)

standing to bring a derivative action on behalf of the partnership, noting that although a limited partner under New York partnership law has some resemblance to a creditor, nevertheless he is in the main "more like a shareholder, often expecting a share of the profits, subordinated to general creditors, having some control over direction of the enterprise by his veto on the admission of new partners, and able to examine books and 'have on demand true and full information of all things affecting the partnership . . .' See N. Y. Partnership Law §§ 98, 99, 112. That the limited partner is immune to personal liability for partnership debts save for his original investment, is not thought to be an 'owner' of partnership property, and does not manage the business may distinguish him from general partners but strengthens his resemblance to the stockholder, and even as to his preference in dissolution, he resembles the preferred stockholder . . ."

As in that situation where it made sense to call the limited partners by whatever label was most apt in order to support their right to sue on behalf of the partnership, so here we feel that the purpose of § 44(a) is best served by excluding them from voting in the election of a trustee.

(b) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions.

(c) Those to limited partners in respect to the capital of their contributions.

(d) Those to general partners other than for capital and profits.

(e) Those to general partners in respect to profits.

(f) Those to general partners in respect to capital.

(2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims.

Appendix B
Opinion of the Court of Appeals

A limited partnership under New York law is possessed of sufficient of the powers and privileges of private corporations not possessed by individuals or general partnerships to meet the definition of "corporation" in § 1(8) of the Act. We have held that a limited partner is not a creditor and that a limited partnership is close enough kin to a corporation so that a general partner, who serves the same function as a corporate officer, is not privileged to withhold the partnership records from Internal Revenue. *United States v. Silverstein*, 314 F. 2d 789, 791, 2 Cir., cert. den. 374 U. S. 807 (1963). The purpose of the disfranchisement provisions of the Act, as developed in cases on disfranchisement, both prior to and under the Act, see *In re Latham Lithographic Corp.*, 107 F. 2d 749, 750 (2 Cir. 1939), is best carried out by disallowing these claims so far as voting for trustee is concerned. See 2 Collier, Bankruptcy, ¶44.02, p. 1640 (14th ed. 1964). Limited partners are too likely to be closely affiliated with the interests of the former management to share in the choice of the trustee who is to represent the interests of the ordinary creditors.

A New York limited partnership partakes sufficiently of the nature of a corporation so that limited partners may be considered stockholders or members within § 44(a). The order disallowing their claims so far as eligibility to vote for trustee is concerned is affirmed.

Appendix B

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter *of* IRA HAUPT & Co., a Limited Partnership, *Bankrupt.*	In Bankruptcy No. 64 B 259
In the Matter *of* IRA HAUPT & Co., a Limited Partnership, *Debtor.*	In Proceedings for an Arrangement No. 64 B 259

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Appendix B
Opinion of the District Court

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PALMIERI, J.

This litigation arose out of the financial disaster which befell Ira Haupt & Co. (Haupt) as a result of the so-called salad oil scandal in November 1963. The facts are substantially as follows:

Haupt was a limited partnership with sixteen general partners and thirteen limited partners. It was engaged in a general brokerage and commission business with its principal place of business in New York City, with a number of branches throughout the country, and utilizing the services of approximately seven hundred employees. Morton Kamerman, a general partner, was, under the partnership agreement, the sole managing partner during its term and sole liquidating trustee after the expiration of that term on December 31, 1963.

As a result of certain transactions with Allied Crude Vegetable Oil Refining Co., Haupt, on November 18, 1963, found itself in dire financial straits. On the following day, Haupt informed the New York Stock Exchange that it lacked the ratio of assets to liabilities required by the Exchange's rules and by the Securities Act of 1934. Haupt was suspended by the Exchange from further operations on November 20, 1963.

On November 21, 1963, the extent of Haupt's capital deficiency was in the neighborhood of twenty million dollars. In an effort to afford a rapid accommodation for valid customer claims and the curtailment of all unnecessary expenses, and in order to preserve public confidence in the stock market, the Exchange and Haupt's creditor banks entered into an agreement whereby the Exchange would advance a fund to pay the Haupt creditors—20,000 customers among them—and the banks would defer their claims

against Haupt to the extent of two dollars for every dollar advanced by the Stock Exchange.

This agreement, clearly setting forth its purpose as one of "orderly liquidation,"[1] was proposed to the Haupt general partners on November 25, 1963, when the deficit had grown to over twenty-five million dollars. They were told that no promises were being made about their debts, and it was made clear that they would continue to be obligated to the creditors as general partners. The agreement was signed providing for appointment of a Committee on which the Exchange and the banks were equally represented. James P. Mahony, Chief Examiner of the Exchange, was named "Liqudator," with broad powers of attorney signed by all the general partners, and which were attached to the agreement. The Committee was chaired by a Vice President of one of the banks, and counsel to it and Mr. Mahony was the firm which has long represented the Stock Exchange and one of the banks.

During the period of liquidation, Mr. Kamerman was engaged by Mr. Mahony to assist in the liquidation of Haupt. but he made no decisions, merely following Mr. Mahony's directions.

The Exchange advanced $7,500,000 at the time of the agreement and an additional $2,000,000 by March 10, 1964. By early March, 1964, all but about 100 or 150 of the 20,000 customer accounts of Haupt having been satisfactorily liqui-

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[1] The three introductory clauses of the agreement read as follows:

WHEREAS Haupt appears to be currently unable to meet its commitments and therefore unable to continue its business;

WHEREAS the Exchange is interested in assisting in the orderly liquidation of the business of Haupt without the delay and expense which may be incident to administrative or other legal proceedings;

WHEREAS the Banks as creditors of Haupt are desirous of cooperating in the effort to achieve such an orderly liquidation; and

dated, the Committee entered into a supplemental agreement with the general partners effective March 10, 1964, which provided, among other things, for the appointment of Edward Feldman as successor Liquidator, thereby permitting Mr. Mahony and his assistants to return to their duties at the Exchange. The minutes of the Committee meeting of March 11, 1964, make it clear that the purpose of the steps taken in March 1964 was to permit "the continued liquidation of Haupt in an orderly fashion." The general partners were told, in the course of their discussion prior to signing it, that if they did not sign the agreement, Haupt would go into bankruptcy and the creditors would have their own trustee appointed anyway.

The limited partners took no part in these transactions. In February 1964, certain of them, three of whom are the respondents here, commenced an action in the Supreme Court, New York County, for the appointment of a Receiver of Haupt's assets and affairs. This application was denied on March 18, the Court granting instead a motion by petitioners here to compel arbitration under the Constitution and Rules and Regulations of the Exchange.

On March 23, 1964, an involuntary petition in bankruptcy was filed in this Court against Haupt by three of the limited partners who acted as petitioning creditors and who are among the respondents. This was countered on March 30, 1964 by a petition of the general partners under Chapter XI for an arrangement which was tantamount to an implementation of the original agreement. Two of the general partners, Messrs. Kamerman and Kaufman, did not join in the petition.

From the facts just stated, several conclusions are inescapable. Haupt was hopelessly insolvent when it was suspended by the Exchange on November 20, 1963 and it has not engaged in the business for which it was organized since that time. No one has suggested, in the course of these proceedings, that its business can be rehabilitated. On the contrary, its affairs have been the subject of sys-

tematic liquidation, a course of action for which the Committee created by the agreement of November 25, 1963, and not the partnership, has been responsible. Similarly, the institution of proceedings under Chapter XI of the Bankruptcy Act was the act of the Committee and not of the partnership.

Since nearly all the public customers have been paid out,[2] what remains to be done with respect to the Haupt affairs no longer affects the public interest at large, but does affect substantial interests of the banks, the Exchange, the general and the limited partners, and probably others as well. There is ample evidence that these interests are not concordant. As the following discussion is intended to demonstrate, they can be safeguarded only by the normal bankruptcy procedures.

The case came on before Referee Ryan who granted a motion to dismiss the Chapter XI petition and denied a motion for a stay of the pending involuntary bankruptcy proceedings. The record before Referee Ryan is a very extensive one, consisting of several hundred exhibits, many of them lengthy, and a record of testimony running to nearly 1000 pages. I am convinced from a study of this record that the conclusions of the Referee are amply substantiated by the factual record and by valid authority.

It is clear that Ira Haupt & Co. is today an expired partnership and its only future consists in the winding up of its affairs. It has no h ven except the Bankruptcy Court.

In the light of this factual background, Referee Ryan was justified in relying upon *In re Pure Penn Petroleum Co.*, 188 F. 2d 851 (2d Cir. 1951), as a ground for the dismissal of the Chapter XI petition. This holding made it clear that Chapter XI arrangements "must comprehend something more than a mere surrender by the debtor of all his assets for liquidation and distribution for creditors."

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[2] Customers still on the books are those who cannot be located or whose payments have been held up for some legal reason.

(at p. 855). If all that is in prospect is liquidation, a statutory process for attaining this end is provided by Chapter X of the Bankruptcy Act, and that is the normal and appropriate means for its accomplishment. These are the procedures designed to protect the rights of interested parties. *Cf. Esbitt* v. *Dutch-American Mercantile Corp.*, No. 28724, 2d Cir., July 14, 1964. A liquidation plan under Chapter XI is not available since "there are good reasons why Congress provided that a sale of all assets may be part of the Chapter X plan but did not so provide with respect to a Chapter XI arrangement. . . ." *In re Pure Penn Petroleum Co., supra,* at p. 854 *et seq.* See also Krause, *Chapters X and XI—A study in Contracts,* 19 Bus. Law. 511 (1964).

An additional ground relied on by the Referee, and which is substantiated by the record and by valid authority, is that the Chapter XI proceedings were not consented to by all the general partners and were not voluntary. The discussion in the Referee's opinion is sufficient and need not be repeated here. Only two salient facts need to be emphasized—first, that the commencement of the Chapter XI proceedings for an arrangement was not the act of Haupt but the act of the Committee. No one has suggested that Haupt functioned as a partnership after the catastrophic events of November, 1963. Had Haupt not ceased to exist then, it would have come to an end on December 31, 1963, by express terms of the partnership agreement; and the sole managing partner, Mr. Kamerman, who was also liquidator trustee under the partnership agreement, surrendered his rights to the Committee and never functioned as liquidator under the partnership agreement. The acts of all the general partners after November 20, 1963, were acts of abdication and surrender inconsistent with any notion of continuity of the partnership qua partnership. Under these circumstances, the Chapter XI proceedings were properly dismissed since the persons who initiated them had no power or right to do so; and even if it could be assumed, *arguendo,*

that they retained their partnership status, the consent of all the partners was necessary and it was lacking here. See 8 Collier, Bankruptcy, § 4.02 at pp. 367-9 (14th ed. 1963).

An additional matter worthy of mention is the conclusion of the Referee that the machinery of Chapter XI was reserved by the Committee under the Agreement of November 25, 1963, as "a device to circumvent any attempt on the part of the limited partners to exercise whatever rights they might have under the Bankruptcy Act or otherwise to effect a liquidation of Haupt." The limited partners took no part in the agreements and transactions with the Exchange and the banks. They have initiated a number of lawsuits of a derivative nature and assert in these proceedings that Haupt is entitled to recover substantial sums from the Exchange, the banks and the general partners. Apart from whether these assertions are well founded, only the safeguard of bankruptcy proceedings can preserve the integrity of these claims.

A final matter requiring discussion relates to a ruling affecting the election of the trustee. I find no difficulty in agreeing with the Referee's conclusion that the limited partners were disqualified from voting for the trustee. His decision in this respect was based upon the definition section of the statute § 1.(8), 11 U. S. C. § 1.8(8)[3], entitled, "Meaning

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[3] Section 1.(8) provides as follows:

§ 1. *Meaning of Words and Phrases.* The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

. . . .

(8) "Corporation" shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument; . . . .

of Words and Phrases—Corporation," and which he apparently felt contained language sufficiently broad to warrant the exclusion of such partners from voting under the disenfranchisement provisions of § 44(a), 11 U. S. C. § 72(a)[4], of the Bankruptcy Act. The limited partners contend that this ruling is erroneous because under the provisions of the Bankruptcy Act of 1898, the definitions of corporation specifically included "limited partnerships," whereas the 1938 amendment specifically eliminated "limited partnerships" therefrom. The legislative history, H. R. Rep. No. 1409, 75th Cong., 1st Sess. 5 (1937), makes it clear that Congress made the change, not because of any preoccupation with the disenfranchising provisions, but because it had amended § 5, 11 U. S. C. § 23, so as to expand the application of this section to limited partnerships, a result completely consonant with the previous structure of the statute. This made it no longer necessary to include such partnerships as part of the corporation definitions. There was not, however, any abridgment of the basic principle that the purpose of the disenfranchising provisions is to prevent the election of a trustee who may be too closely related to the bankrupt and thus impair a vigorous independent defense of the creditors' interests. These provisions merely extend and make mandatory "a policy which the Courts had sometimes enforced in the absence of express statutory direction." *In re Latham Lithographic Corp.*, 107 F. 2d 749, 750 (2d Cir. 1939). The Referee's conclusion is therefore sustainable on equitable as well as statutory grounds. It follows,

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[4] Section 44(a) provides as follows:

The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall, at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate.

therefore, that the disability of the limited partners encompassed all of their claims, whether as general creditors or customer creditors, and that they were properly excluded from voting.

In the opinion of Judge Swan *In re Latham Lithographic Corp., supra,* a stockholder-creditor was held to be under a total personal disability, whereas the bona fide assignee of one-half his creditor claim was held qualified to vote under § 44 of the Bankruptcy Act.

It follows from what has been said that the decisions of the Referee are affirmed in all respects.

The petitions to review the orders of the Referee are dismissed.

IT IS SO ORDERED.

Dated: New York, N. Y.
August 11, 1964

EDMUND L. PALMIERI
Edmund L. Palmieri
U. S. D. J.

Appendix B

OPINION OF REFEREE IN BANKRUPTCY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter of IRA HAUPT & Co., a limited partnership, Debtor.	No. 64 B 259 DECISION ON MOTIONS TO DISMISS PROCEEDINGS FOR AN ARRANGEMENT AND FOR OTHER RELIEF.

Ira Haupt & Co. (hereinafter "Haupt") is a limited partnership and was formed pursuant to the provisions of the New York Partnership Law for a term beginning April 1, 1960 and ending December 31, 1963. Haupt was engaged in a general brokerage and commission business with its principal place of business in New York City. The partnership was comprised of sixteen general partners and thirteen limited partners. Morton Kamerman, a general partner, was, under the partnership agreement, the sole Managing Partner at all times during the period with which the proceedings in this Court are concerned.

Under the partnership agreement, Mr. Kamerman was also the sole Liquidating Trustee.

As a result of certain transactions with Allied Crude Vegetable Oil Refining Co. (hereinafter "Allied"), Haupt, on November 18, 1963, found itself in dire financial straits.

On November 25, 1963, the general partners of Haupt entered into an agreement with the New York Stock Exchange (hereinafter "the Exchange") and certain banks (hereinafter "the Banks").

The agreement made on November 25, 1963 (hereinafter "the Agreement"), was amended by a further agreement dated March 8, 1964.

Appendix B
Opinion of Referee in Bankruptcy

James P. Mahony undertook the liquidation of Haupt under the agreement. He was succeeded in this role by Edward Feldman on March 19, 1964.

On March 23, 1964, an involuntary petition in bankruptcy was filed in this Court against Haupt. The petitioning creditors are three of the limited partners of Haupt. Six of the general partners then signed a petition under Chapter XI on behalf of Haupt, and this petition was filed on March 30, 1964.

By Order to Show Cause, dated March 31, 1964, Haupt moved for an order staying adjudication and administration of the estate in bankruptcy, pursuant to Section 325 of the Act. This motion first came on for hearing on April 17, 1964.

By Order to Show Cause, dated April 8, 1964, Haupt moved for an order staying and enjoining the petitioning creditors and other limited partners of Haupt from continuing with certain actions pending in this Court and in the Supreme Court of the State of New York. This motion first came on for hearing on April 16, 1964. Limited relief was granted on this application by order dated 6/1/64.

By Order to Show Cause, dated April 9, 1964, Bernard Klebanow, George Lewis and Michael Sloan, the petitioning creditors, moved for an order dismissing the petition under Chapter XI of the Bankruptcy Act filed by Michael Scherk, Samuel Fink, D. Dudley Jaffin, Howard M. Brenner, Leonard G. Hanauer and Maurice Glaubach. This motion first came on for hearing on April 16, 1964.

By Order to Show Cause, dated April 21, 1964, Haupt moved for an order dismissing the application to dismiss the Chapter XI proceeding, or, in the alternative, striking from the said application, certain material. This motion first came on for hearing on April 27, 1964, and was denied from the bench.

The applications which were to be heard on April 16 and April 17 were adjourned by the parties to April 27,

1964, the day which had been set forth for the first meeting of creditors in the proceedings for an arrangement. At this first meeting, the creditors were afforded an opportunity to nominate a trustee to be appointed by the Court in case it should become necessary to administer the estate in bankruptcy. Bankruptcy Act, Section 338. Two persons, Edward Feldman and Abraham M. Glickman, were nominated. Claims were voted for them. The nominations were closed and the Court deferred ruling on the outcome of the election until the parties had had an opportunity to present evidence and memoranda on the allowability of the claims sought to be voted or the qualification of the candidates.

On April 27, 1964, the parties were informed that any evidence received would be considered by the Court on each one of the several matters which were before it.

The proceedings were thereafter several times adjourned after taking testimony and hearing the parties. The proceedings were closed on the 18th of May, 1964, reserving to the debtor the right to add to the record consents of other general partners to the filing of the proceeding under Chapter XI of the Bankruptcy Act.

The consents of the general partners of Haupt have been obtained except those of Morton Kamerman and Joseph M. Kaufman who "consents to and acquiesces in the filing of the Chapter XI proceeding, but does not confirm or deny any of the allegations contained in said Chapter XI petition".

* * * * *

Haupt's normal operations employed thirteen or fourteen branches, six of them in New York City. The firm used the services of approximately seven hundred employees. The partners were engaged in a commission business trading on behalf of customers on the New York Stock Exchange and on the American Stock Exchange. They were engaged in underwriting municipal bonds and corpo-

rate securities and the making of a secondary market in municipal bonds in various places around the country. The firm had a department devoted to over-the-counter trading in which Haupt acted as both agent and as principal. There was a mutual fund department and a commodity department.

On Thursday night, November 14, 1963, a margin call had gone out to Allied. The call was for one million dollars and it was due on November 15. A second call went out Friday evening, November 15. A third call was sent out on the evening of November 18, due on November 19. The aggregate of the three calls was over fifteen million dollars.

On November 18, Morton Kamerman spoke to a Mr. Newman of the Exchange. He then met in the morning with officials of the Exchange and the firm's counsel, Mr. Gordon. At that time the Exchange was informed that Haupt's aggregate indebtedness as a broker was in excess of two thousand percent of the net capital employed in its business. So far as Mr. Kamerman then knew, Haupt was under minimum requirement by a little over $170,000. Mr. Kamerman was hopeful of working something out. There was an equity of either one cent or two cents in the Allied account. He telephoned from the Exchange to the Haupt office to direct the liquidation of the position.

Peat, Marwick, Mitchell & Co., certified public accountants, were Haupt's accountants. On November 19, 1963, the Exchange requested statements of the Haupt condition.

At about four-thirty in the afternoon of November 19, Mr. Kamerman was informed that Allied had filed a petition for an arrangement in the United States District Court for the District of New Jersey.

On the morning of November 20, 1963, the banks interested in the affairs of Haupt met at the Haupt offices.

When Haupt's commodity position was settled, it appeared that a loss of approximately $6,600,000 had been

sustained, leaving a small capital for Haupt in the area of $315,000. By November 21, however, the infirmity of the American Express Warehouse receipts resulted in a capital deficiency in the area of twenty million dollars. Prior to that time, the Haupt partners were attempting to raise funds in the neighborhood of three to four million dollars which they believed would cover the losses. The Haupt partners held a number of meetings in which it was agreed that they would stand by to await the outcome of meetings of their counsel with the interested banks and the Exchange.

On November 22, a meeting was held at the Exchange. At this meeting, the officials of the Exchange had determined that the public would be protected by the Exchange putting up funds for this purpose. On November 23, the Banks' representatives and the Exchange representatives worked out the details of their agreement.

On Saturday, November 23, Mr. Kamerman was first informed that the Exchange was going to put up a fund to pay the Haupt creditors and that the Banks were going to defer their claims against Haupt to the extent of two dollars for every dollar that the Stock Exchange would put up.

On November 25, the working net worth deficit of Haupt was over twenty-five million dollars. Substantially all of that deficit resulted from the failure of the warehouse receipts. On that date, the amount payable to Haupt's customers was $9,646,632.55. More than half of this sum represented free credit balances owing to customers. Haupt had been suspended by the Exchange on November 20, 1963. The first business day following the events of the week of November 18, 1963 was Tuesday, November 26. Without outside assistance, Haupt was in no position to open for business on that day.

On Monday, November 25, a meeting of all the general partners was held at the Haupt offices. Present was their

counsel, Mr. Gordon, together with Sidney Krause of the firm of Krause, Hirsch, Gross & Heilpern.

On Friday, November 22, 1963, Mr. Krause had informed Mr. Kamerman that he, Mr. Krause, was preparing Chapter XI papers. This was the first that Mr. Kamerman, the Managing Partner of Ira Haupt & Co., had heard of it. When they met on November 25, 1963, Mr. Krause read to them the text of an agreement that had been proposed. They had many questions concerning the agreement and they had objections to it.

The partners were told that no promises were being made about their debts, and it was made clear that they would continue to be obligated to the creditors as general partners. But they were also told that if they wanted to continue to earn their livelihood in Wall Street, it would be in their best interests to sign the agreement of November 25. It appears that the Agreement was finally signed late on the night of November 25 or early on the morning of November 26.

Pursuant to the Agreement, the Exchange then made available the sum of seven and a half million dollars to be disbursed. James P. Mahony, Chief Examiner of the Exchange, undertook his duties as liquidator of Haupt on November 26, 1963. He continued in that capacity until the opening of business on March 19, 1964. During that period of time he continued to receive his salary from the New York Stock Exchange. While acting as Liquidator, Mr. Mahony considered his attorney to be Mr. Bradow of the firm of Milbank, Tweed, Hadley & McCloy. This firm has represented the New York Stock Exchange and the Chase Manhattan Bank for a number of years. Frederick W. Bardusch, Vice President of the Chase Manhattan Bank in the Loan Review Department, was chairman of the committee established by the Agreement. Milbank, Tweed, Hadley & McCloy were counsel to the committee. Mr. Musselman, of that law firm, acted as Secretary of the com-

mittee. Mr. Mahony undertook his duties with a staff of three or four other men employed by the Stock Exchange. At the peak of his work, he had twenty-five or thirty employees of the Stock Exchange working at the Haupt office. No charge was made to Haupt for the services of these employees.

By March 18, 1964, all but about one hundred or one hundred fifty of the twenty-thousand customer accounts of Haupt had been liquidated.

In addition to the seven and a half million dollars originally deposited in the Bankers Trust Company in the "New York Stock Exchange Liquidators' Escrow Account", the Exchange advanced two million dollars more by March 10, 1964.

Mr. Kamerman had been engaged by Mr. Mahony to assist in the liquidation of Haupt. In the performance of these duties, he made no decisions with reference to the affairs of Haupt; he merely followed Mr. Mahony's directions.

On Friday, March 6, Mr. Brandow came to Haupt's office and asked Mr. Kamerman to assist him in getting a new agreement signed in amendment of the agreement of November 25, 1963. He explained that the Stock Exchange had done its job in the liquidation of Haupt. Only a small number of customer accounts remained open. It was felt that Mr. Mahony and his assistants should be permitted to return to their duties at the Exchange. A substitute liquidator should be appointed, because Mr. Mahony's expertise was no longer required.

The decision to select a substitute liquidator was made after meetings among representatives of the Banks and the Exchange. The Exchange had concluded that the securities part of the problem was solved or virtually solved; The Exchange wanted to retire from the scene.

A few days before March 8, 1964, Edward Feldman was invited by Horace McAfee of Simpson, Thacher & Bartlett

and by Frank Musselman of Milbank, Tweed, Hadley & McCloy to attend a meeting. Mr. Feldman was informed that they were looking for someone to act in connection with the affairs of Haupt. On Saturday, March 7, 1964, Mr. Feldman attended a meeting at the Chase Manhattan Bank, at which meeting his competency was reviewed. He was told that the matter was going to be discussed by the Haupt partners on March 8, at the Stock Exchange and it was suggested that he attend.

At the meeting, Mr. Feldman was introduced to a few of the partners. The partners of Haupt met in one room while representatives of the Banks and the Exchange met in a second room.

All the general partners except Allen Seskis, attended the meeting. At that time, Mr. Brandow distributed copies of the agreement. The partners questioned whether Mr. Feldman, the successor liquidator was competent to pursue the rights of Haupt, particularly against American Express Company. Mr. Brandow assured them that Mr. Feldman would pursue these claims.

After Mr. Brandow left, the partners were not satisfied with the answers to some of their questions. Mr. Krause then gave his opinion that the partners should sign, giving as one of the reasons that if they did not sign the agreement of March 8, 1964, Haupt would go into bankruptcy and the creditors would have their own trustee appointed anyway. After some discussion voicing concern for the rights of the limited partners, the general partners signed the agreement. Mr. Seskis signed the agreement on Tuesday, March 10.

Mr. Brandow had suggested that Mr. Feldman be brought in to be introduced to the general partners but they declined the offer. Mr. Feldman's salary was not discussed with any of the general partners, at the meeting of March 8.

Edward Feldman was informed by a telephone call that he had been appointed successor liquidator. He commenced

the performance of his duties on March 12, assisting Mr. Mahony until he replaced Mr. Mahony with the opening of business on March 19.

At times Mr. Feldman was present at meetings of the committee, when the filing of a petition under Chapter XI of the Bankruptcy Act was discussed. Mr. Feldman took no part in those discussions and prior to coming to court, he had no opinion on whether a Chapter XI petition should be filed.

At one such meeting, the question arose how to proceed in the light of the filing of the petition in bankruptcy. No general partner of Haupt attended that meeting. The general consensus of those present was "that they should file a Chapter XI proceeding . . . Mr. Krause, . . ., was to prepare the papers. It was to be signed by a general partner, one or more general partners".

On Friday, March 27, 1964, Morton Kamerman met with Sidney Krause and Elliott Krause who is also a member of the firm of Krause, Hirsch, Gross & Heilpern, at the office of Jerome Kamerman. Jerome Kamerman was present together with Arthur Delson and Cyrus Gordon. Mr. Kamerman was informed that the involuntary petition in bankruptcy herein had been filed. The Krause office had prepared a petition instituting proceedings under Chapter XI of the Bankruptcy Act. Efforts to induce Mr. Kamerman to execute that petition were unsuccessful.

The Nomination of a Trustee

Five limited partners sought to vote claims aggregating $1,795,861.15 in support of the nomination of Abraham M. Glickman to serve as trustee in any ensuing bankruptcy as follows:

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Claim of:	*Amount:*
1) Bernard Klebanow	$418,093.42 as a general creditor 93,171.39 as a customer creditor
2) George Lewis	$262,214.80 as a general creditor 56,600.12 as a customer creditor
3) Michael Sloan	$367,431.62 as a general creditor 23,247.80 as a customer creditor
4) Harold L. Marantz as one of the Executors of the Estate of Charles Marantz[1]	$261,941.34 as a general creditor 50,660.66 as a customer creditor.
5) Lazarus S. Heyman	$262,500.00 as a general creditor
Total	$1,795,861.15

Objections were raised to the voting of these claims including the exclusionary provision of Section 44.a. of the Bankruptcy Act which provides in pertinent part:

> "The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall, at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate."

[1] By the terms of the agreement of Limited Partnership, on the death of a limited partner, his estate, in effect, becomes a limited partner. Article 21. The proof of claim voted by Harold L. Marantz as one of the executors states: "(b) The undersigned was a Limited Partner of Haupt."

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Section 1.(8) provides as follows:

> *"Meaning of Words and Phrases.* The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:
>
> • • •
>
> 'Corporation' shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument; . . ."

This statutory language prevents the limited partners from voting for the nomination of a trustee in a Chapter XI proceeding. 8 Collier on Bankruptcy, 14th ed., Para. 5.49[9], [9.1].

The limited partners rely upon language in 3 Collier on Bankruptcy, 14th ed., Pages 50, 51:

> "It would seem by implication that a creditor of a firm who is also one of its partners, should not for that reason be deprived of the right to vote for trustee in the firm's bankruptcy. [footnote omitted]"

This statement of the text writer is not supported by authority and it gives no consideration to the clear language of Section 1.(8) above-quoted.

Accordingly, the limited partners' claims are not allowed for voting purposes.

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Creditors' claims were voted in support of the nomination of Edward Feldman as follows:

Claim of:	*Amount:*
1) Manufacturers Hanover Trust Company	$ 2,715,128.22
2) The Chase Manhattan Bank	$ 3,225,675.73
3) Morgan Guaranty Trust Company of New York	$ 3,088,987.95
4) First National City Bank	$ 2,070,511.05
5) Henry Ansbacher & Company	$ 282,314.30
6) Abbott, Proctor & Pain	$ 2,359.48
7) H. Cassel & Co.	$ 781.27
8) Clarke, Dodge & Company	$ 9,963.95
9) Oliver Lundquist	$ 19,000.00
10) Sartorius & Company	$ 2,452.66
Total:	$11,417,174.61

The limited partners attack the right of all of these claimants except Oliver Lundquist to vote in support of the nomination of Edward Feldman. The claimants other than Lundquist are banks or brokerage firms. The limited partners contend that they may not vote because of their close association with the estate of Ira Haupt & Co. In addition they claim that the banks are barred from voting because they received preferences.

The claim of Oliver Lundquist is for consultative services. It is supported by a statement which specifies the work done and it is in the sum of $19,000.00.

It is unnecessary to rule upon the objections to the other claims sought to be voted in favor of Mr. Feldman.

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Edward Feldman is nominated to be the trustee herein on the claim of Oliver Lundquist in the sum of $19,000.00, which is found to be proper and it is allowed for voting purposes.

There is no requirement that the Court, at this time, rule upon the qualifications of the nominee. It has been said that to do so "would seem the more desirable practice".[2] However, in view of the ruling made herein on the motion to dismiss the Chapter XI proceedings, I reserve ruling upon Mr. Feldman's qualification to act as trustee. In that regard, see Matter of Eloise Curtis (2 Cir. 1964) 326 F. 2d 698; *id.* Referee's Memorandum on Remand, February 17, 1964, now on review.

The Motion to Dismiss the Proceedings Under Chapter XI and the Motion to Stay Bankruptcy Proceedings

The motion to dismiss the Chapter XI proceeding is based upon two grounds: (1) the fact that all the general partners have not joined in the petition and (2) the contention that a Chapter XI proceeding is not appropriate to accomplish the liquidation of Haupt.

Haupt contends that there is no authority for the dismissal of a Chapter XI proceeding at this stage.

There is no specific provision in the Bankruptcy Act for this motion to dismiss. The application, however, is one in the nature of a motion for summary judgment. The Court has the power to dismiss any proceeding when it appears to a certainty at any time that the proceeding was improvidently commenced or cannot be successfully concluded. F. R. Civ. P. 56; *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 357, n. 4; *Cohen* v. *Eleven W. 42nd Street, Inc.*, (C. A. 2, 1940) 115 F. (2d) 531; 6 Moores Fed. Prac., 2d ed., ¶56.17[7].

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[2] 8 Collier on Bankruptcy, 14th ed., Para. 5.49, Page 769.

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The Chapter XI proceeding purportedly filed on behalf of Haupt must fail.

Two of the partners, Morton Kamerman and Joseph M. Kaufman, have not joined in the petition. This alone requires dismissal. 8 Collier on Bankruptcy, 14th ed., ¶402 [4.3]. As hereinafter appears, the proceedings are otherwise defective.

A Chapter XI proceeding must be voluntary. See 8 Collier on Bankruptcy, 14th ed., Para. 4.04. Haupt has not taken any action toward invoking the power of this Court to effectuate an arrangement to be proposed by it. The record spells out that the use of the machinery of Chapter XI had been reserved by the Committee under the Agreement as a device to circumvent any attempt on the part of the limited partners to exercise whatever rights they might have under the Bankruptcy Act or otherwise to effect a liquidation of Haupt. The commencement of these proceedings for an arrangement was not the act of Haupt. To the contrary, it was the act of the Committee.

In effect, the parties to the Agreement undertook as a joint venture to carry out the liquidation of Haupt. The joint venture has a "limited partner", to wit, the limited partnership of Ira Haupt & Co. From all the evidence that has been presented in these proceedings, it is clear that on November 25, 1963, Haupt's general partners completely surrendered the firm's power to make any independent judgments to the Exchange and the Banks' acting through their agent, the Liquidator.

Nominally, Edward Feldman has plenary authority over the affairs of the debtor. Yet, Mr. Feldman testified that he had had no discussions with anybody about a plan of arrangement under Chapter XI.

At the conclusion of the proceedings, a document in which Mr. Feldman stated that he acquiesced in the Chapter XI proceedings was received in evidence. When Mr. Feldman was recalled to testify concerning this, it was

made abundantly clear that he had exercised no independent judgment concerning the matter nor was he even well informed in the premises.

At the conclusion of the hearing counsel for Haupt gave a broad outline of a plan of arrangement.

However, in the light of all the circumstances which led up to the formulation of this so-called plan, the conclusion is inescapable that the institution of the proceedings under Chapter XI of the Bankruptcy Act and the offering of any plan of arrangement herein is not the act of Ira Haupt & Co. To the contrary, it is the act of the Committee operating under the agreement of November 25, 1963, who have paid Haupt's counsel's retainer in these proceedings.

The Agreement had as its major goal, the commendable one of averting a panic among investors in securities. This surely would have resulted if Haupt had been unable to meet its obligations to customers when the market opened on November 26, 1963, after the events of the preceding week. The Exchange and the Banks arranged for Haupt's orderly demise and settled their affairs *inter se.*

Despite their worthy motives and the salutary effects of their actions, they cannot use the machinery of Chapter XI to insure that the Agreement will be carried out, for the simple reason that the power of the Court has been invoked not by Haupt but by certain of its creditors. A Chapter XI proceeding may not be involuntary.

In moving for dismissal, the limited partners rely also upon the Pure Penn Petroleum Company, Inc., (2 Cir. 1951) 188 F. 2d 851:

> "But not withstanding the breadth of the definition, of an arrangement under Chapter XI, the arrangement must comprehend something more than a mere surrender by the debtor of all his assets for liquidation and distribution to creditors; . . . (citing 8 Collier on Bankruptcy (14th ed.)"

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They contend that the proceedings should be dismissed even if the debtor had duly filed a Chapter XI petition. This contention is well founded.

The instant case might be distinguishable from the Pure Penn Petroleum Company case, as is contended by those interested in continuing the arrangement proceedings, if there were presented a situation in which Haupt offered something more to its creditors than they would be given in liquidation under straight bankruptcy. The Agreement does not offer creditors more than bankruptcy; it merely offers certain creditors different rights as agreed by the signatories to the said Agreement.

The Agreement gives Haupt nothing, except the right to be liquidated in orderly fashion. This "right" is available to it under the Bankruptcy Act.

Aside from the tacit promise made to the general partners that they will be able to look forward to a future on Wall Street so long as they follow the instructions of the Committee and remain passive, they gain no benefit from the Agreement except the privilege of dubious value of examining the books of Haupt and having made available to them progress reports on the liquidation.

The motion to dismiss the petition in proceedings under Chapter XI is granted.

The motion for a stay of the pending involuntary bankruptcy proceedings is denied.

Settle an appropriate order.

Dated: New York, N. Y.
June 10, 1964.

EDWARD J. RYAN
Referee in Bankruptcy

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Supreme Court of the United States

October Term, 1965

No. 414

In the Matter of
IRA HAUPT & Co.,
a Limited Partnership,

Bankrupt,

BERNARD KLEBANOW, GEORGE LEWIS, MICHAEL SLOAN and HAROLD L. MARANTZ, KENNETH ALAN MARANTZ and EDITH LEE MARANTZ, as Executors of the Estate of Charles Marantz, and LAZARUS S. HEYMAN,

Petitioners,

THE CHASE MANHATTAN BANK and MANUFACTURERS HANOVER TRUST COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

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Petitioners,

THE CHASE MANHATTAN BANK and MANUFACTURERS HANOVER TRUST COMPANY,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS

Question Presented

Are limited partners entitled to vote in the election of a trustee in bankruptcy of a New York limited partnership where the Bankruptcy Act, the law of New York and the limited partnership agreement require that all creditors be paid in full before any payments are made to a limited partner — either on account of capital contribution or other claim?

Statutes Involved

The statutes involved are sections 5g, 44a and 378(1) of the Bankruptcy Act and sections 102, 104, 105(1) and 112 of the New York Partnership Law and are set forth in the appendix hereto, *infra*.

Statement

Ira Haupt & Co. (Haupt), a New York limited partnership and a member firm of the New York Stock Exchange, was engaged in the stock brokerage business until November 20, 1963, when it was suspended by the Exchange (14b, 22b).[1] The capital of Haupt had been abruptly wiped out as a result of the vegetable oil debacle involving Allied Crude Vegetable Oil Refining Corp. (7b, 22b). By November 25, 1963, Haupt's liabilities were more than $25,000,000 greater than its assets (15b).

The creditor banks of Haupt (including respondents), whose claims against Haupt then exceeded $33,000,000 (7b), entered into an agreement with the Exchange and the general partners with a view to the protection of Haupt's public customers and the orderly liquidation of the partnership (14b-15b). Under this agreement the Exchange contributed $9,500,000 to pay Haupt's customers, and the banks deferred their claims to the extent of $19,000,000 (*ibid.*). By March 10, 1964, almost all of Haupt's 20,000 customers had been paid in full (15b-17b).

In February of 1964, three of Haupt's 13 limited partners (who are also petitioners here) applied to the New York State Supreme Court for the appointment of a receiver of Haupt (14b, 16b). Upon the denial of that application, the three limited partners filed an involuntary petition in bankruptcy against Haupt (16b). Thereafter, on March 30, 1964, a petition for an arrangement under Chapter XI of the Bankruptcy Act was filed by certain of the general partners of Haupt (*ibid*).

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[1] References are to pages of Appendix B of the petition unless otherwise indicated.

At the first meeting of creditors in the Chapter XI proceeding held on April 27, 1964, claims were voted for the nomination of a trustee to be appointed by the Court in the event it became necessary to administer the estate in bankruptcy (23b-24b). Claims of five limited partners (petitioners here) totaling $1,795,861.15 were voted for Abraham M. Glickman (counsel for petitioner Heyman) (30b-31b). All ten of the other creditors present at the meeting (including respondents) voted claims totaling $11,417,174.61 in favor of Edward Feldman (33b). The referee disallowed the limited partners' claims for voting purposes, ruled that Mr. Feldman was nominated on the basis of one claim as to which no objection had been raised, decided it was unnecessary to consider objections to other claims voted for Mr. Feldman, reserved ruling on Mr. Feldman's qualifications, and dismissed the Chapter XI petition (33b-34b, 37b).

The referee's decision disenfranchising petitioners at the election in which Mr. Feldman was nominated was affirmed by the District Court (13b-21b) and the Court of Appeals (3b-12b), which also denied petitions for rehearing (1b) and rehearing in banc (2b). It is from that determination that petitioners seek review by this Court.

On June 26, 1964, the referee disqualified Mr. Feldman "on the ground that he was too closely connected with the debtor,"[2] and announced that at the first meeting of creditors in the bankruptcy proceeding the "creditors would be given an opportunity to elect a trustee. . . ."[3] A new election was held at the first adjourned meeting of creditors in the bankruptcy proceeding on September 11, 1964.[4] Thirty claims (including respondents') totalling $19,118,549.06 were voted for Prof. Charles Seligson; four claims representing $636,557.99 were voted for Samuel Adelman; and seven limited partners (including petitioners) with claims of $2,787,660.31 voted for their prior nominee, Mr. Glick-

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[2] In re Ira Haupt & Co., 240 F.Supp. 10, 13 (S.D.N.Y. 1965).

[3] *Ibid.* at p. 13, n. 1.

[4] *Ibid.* at p. 14.

man.[5] The referee again ruled that the limited partners were not entitled to vote, provisionally disallowed all claims voted for Prof. Seligson as to which objections had been made except those of nine former employees of Haupt, and ruled that Prof. Seligson had been elected trustee.[6]

On petition for review of the referee's decision, the District Court affirmed the appointment of Prof. Seligson as trustee and ruled that the limited partners were not entitled to vote.[7] The Court also held that the Exchange and the banks had been improperly disenfranchised as parties in control of the bankrupt.[8] This did not, however, affect the election of the trustee as the Exchange and the banks had voted for Prof. Seligson.[9]

Finally, Prof. Seligson has been acting as trustee of Haupt for almost a full year.[10] His qualifications are unquestioned, and even petitioners "have praised [his] ability and integrity. . . ."[11]

ARGUMENT

I

The question presented by the petition is moot.

The petition raises only the issue of whether petitioners were properly disenfranchised in the Chapter XI election of Mr. Feldman as trustee. Although the petition is silent on this point, the Chapter XI election was inconclusive. Mr. Feldman received a majority of votes in both number and amount, but he was subsequently disqualified by the referee. A second election was not held in the Chapter XI

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[5] *Ibid.*
[6] *Ibid.* at pp. 14-15.
[7] *Ibid.* at pp. 31-32.
[8] *Ibid.* at pp. 17-18.
[9] *Ibid.* at p. 14.
[10] *Ibid.* at p. 31.
[11] *Ibid.* at p. 31, n. 56.

proceeding because by the time Mr. Feldman was disqualified, the Chapter XI petition had been dismissed and Haupt adjudicated a bankrupt. Since no trustee had been elected and qualified in the Chapter XI proceeding, the referee properly called for a new election at the first meeting of creditors in the bankruptcy proceeding. 8 Collier, Bankruptcy ¶ 5.49, p. 782 (14th ed.); see also *In re Dejay Stores, Inc.*, 220 F. Supp. 497, 502 (S.D.N.Y. 1963).

Petitioners participated in the second election and were again disenfranchised (and out-voted in number and amount), but the validity of that election is not before this Court. Indeed, it has not even been reviewed by the Court of Appeals. Stated simply, petitioners are asking this Court to review the propriety of a prior election in which the trustee elected by others was disqualified and which has been superseded by a subsequent election. Moreover, the second election resulted in the appointment of Prof. Seligson as trustee whom petitioners "have praised [for his] ability and integrity. . . ."[12]

In view of the conceded qualifications of Prof. Seligson, the petition understandably avoids making any claim that his election has prejudiced the administration of the bankrupt or is not in the best interests of all creditors. Whether or not petitioners were properly disenfranchised in the first election, no conceivable purpose could be served by further review of that proceeding since the first election was inconclusive and a new election has in fact been held as required by sections 44a and 378(1) of the Bankruptcy Act.

II

The decision below is clearly correct.

Petitioners' restrictive interpretation of section 44a of the Bankruptcy Act is contrary to the general scheme of the Act and inconsistent with the specific provisions of section 5g. Under section 5g (Appendix, *infra*, p. A-1) a

[12] *Ibid.*

limited partner is entitled to payment only after all partnership debts are paid and then in the order of distribution as provided by the applicable state laws. Petitioners have attempted to avoid the New York Partnership Law by quoting only a portion of section 102 to the effect that for certain claims a limited partner may share pro rata with general creditors. Section 102 also provides, however, that no limited partner shall receive any payment "in respect to any such claim . . . if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners." Comparable provisions subordinating a limited partner's claim for profits and capital contribution are set forth in sections 104, 105(1) and 112 of the New York Partnership Law. (Appendix, *infra*, pp. A-2 — A-4.)

Moreover, petitioners' argument that limited partners under New York law have "a right to be treated *pro rata* with other creditors"[13] with respect to their claims as "customers" of Haupt overlooks the fact that petitioners' claims as "customer creditors" are based solely on their capital investments allegedly in excess of the requirements of the Haupt partnership agreement. As the Court of Appeals stated, however, the partnership agreement "makes the debts and liabilities of the partnership to the general creditors superior to those of the limited partners . . ." (9b). Petitioners also ignore the recent decision in *Nexsen* v. *New York Stock Exchange*, 24 A. D. 2d 514, 515, 261 N. Y. S. 2d 780, 783 (2d Dep't 1965), where the Appellate Division stated that a limited partner of Haupt "is not entitled to payment, either on account of his capital contribution or return thereon, or as a creditor, before creditors who are not partners are paid in full or until full payment to them is assured (Partnership Law, §§ 102, 105, 112)."

Equally unpersuasive is petitioners' attempt to dissociate themselves from any attributes of a stockholder. Their interests in Haupt arose from their equity investments and expectations of return on such investments.

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[13] Petition, p. 9.

The claims of each petitioner described "as a general creditor" in the petition (p. 3) represent nothing more than the return of contract capital invested in Haupt, interest thereon, and profit participation.[14] As the New York Court of Appeals pointed out in *Ruzicka* v. *Rager*, 305 N. Y. 191, 197-98, 111 N.E.2d 878, 881 (1953), a limited partner's position is "analogous to that of a corporate shareholder."

A similar view was expressed in *Klebanow* v. *New York Produce Exchange*, 344 F.2d 294, 297 (2d Cir. 1965), where the Court, while acknowledging that a limited partner has some resemblance to a creditor, stated that "in the main, a limited partner is more like a shareholder, often expecting a share of the profits, subordinated to general creditors, having some control over direction of the enterprise by his veto on the admission of new partners, and able to examine books and 'have on demand true and full information of all things affecting the partnership' . . . . That the limited partner is immune to personal liability for partnership debts . . . may distinguish him from general partners but strengthens his resemblance to the stockholder; and even as to his preference in dissolution, he resembles the preferred stockholder." Indeed, in that case petitioners Klebanow and Lewis successfully asserted their right to bring a derivative action on behalf of Haupt, the Court pointing out, however, that "appellants disclaim creditor status in this appeal, although on another, Klebanow v. Chase Manhattan Bank, 343 F.2d 726 (2 Cir. 1965), they assert they are that for the purpose of voting their claims as limited partners in the election of a trustee in bankruptcy." (344 F.2d at 297)

It plainly was never contemplated by the Bankruptcy Act that a trustee would be elected by those whose interests are "too likely to be closely affiliated with the interests of the former management" (12b) and, to that extent, inimical to the interests of the creditors. There is no reason to assume that a trustee elected by a group of equity investors,

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[14] See petitioners' appendix in Court of Appeals, p. A48.

who can share in the estate only after all creditors are paid in full, will administer the bankrupt in the best interest of the creditors.

Conclusion

Review by this Court of an election proceeding which was inconclusive could serve no purpose especially since a second election has already been held. Moreover, the labelling of petitioners' claims as "creditor claims" cannot change the fact that petitioners seek only a return of their capital investment in Haupt and were properly disenfranchised. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 27, 1965

APPENDIX

Bankruptcy Act, Section 5g

The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each general partner to the payment of his individual debts. Should any surplus remain of the property of any general partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be distributed among the individual partners, general or limited, or added to the estates of the general partners, as the case may be, in the proportion of their respective interests in the partnership and in the order of distribution provided by the laws of the State applicable thereto.

Bankruptcy Act, Section 44a

The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall, at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee so appointed fails to qualify as herein provided, the court shall make the appointment. If the bankrupt is a face-amount certificate company, as defined in section 4 of the Investment Company Act of 1940, the court alone shall make the appointment; but the court shall not make such appointment without first notifying the Securities and Exchange Commission and giving it an opportunity to be heard.

Bankruptcy Act, Section 378(1)

Upon the entry of an order directing that bankruptcy be proceeded with —

(1) in the case of a petition filed under section 321 of this title, the bankruptcy proceeding shall be deemed reinstated and thereafter shall be conducted, so far as possible, as if such petition under this chapter had not been filed.

New York Partnership Law, Section 102

Loans and other business transactions with limited partner

(1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall in respect to any such claim

(a) Receive or hold as collateral security any partnership property, or,

(b) Receive from a general partner or the partnership any payment, conveyance or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(2) The receiving of collateral security, or a payment, conveyance or release in violation of the provisions of subdivision one is a fraud on the creditors of the partnership.

New York Partnership Law, Section 104

Compensation of limited partner

A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except lia-

bilities to limited partners on account of their contributions and to general partners.

New York Partnership Law, Section 105(1)

Withdrawal or reduction of limited partner's contribution

(1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until

(a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them.

(b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of subdivision two, and

(c) The certificate is cancelled or so amended as to set forth the withdrawal or reduction.

New York Partnership Law, Section 112

Distribution of assets

(1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(a) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners.

(b) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions.

(c) Those to limited partners in respect to the capital of their contributions.

(d) Those to general partners other than for capital and profits.

(e) Those to general partners in respect to profits.

(f) Those to general partners in respect to capital.

(2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims.

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Supreme Court of the United States

OCTOBER TERM—1965

In the Matter

of

IRA HAUPT & CO.,
a Limited Partnership,

Bankrupt,

BERNARD KLEBANOW, GEORGE LEWIS, MICHAEL SLOAN and HAROLD L. MARANTZ, KENNETH ALAN MARANTZ and EDITH LEE MARANTZ, as Executors of the Estate of Charles Marantz,

Petitioners,

LAZARUS S. HEYMAN,

Petitioner,

THE CHASE MANHATTAN BANK and MANUFACTURERS HANOVER TRUST COMPANY,

Respondents.

PETITIONERS' REPLY BRIEF

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5 Moore, Federal Practice ¶46.06, pp. 1902-1905 (2d ed. 1964) 7

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LAZARUS S. HEYMAN,
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THE CHASE MANHATTAN BANK and MANUFACTURERS HANOVER TRUST COMPANY,
Respondents.

PETITIONERS' REPLY BRIEF

Respondents do not address themselves to the issues raised by the decision below and by the Petition herein, which are whether the right to vote in bankruptcy proceedings involving limited partnerships is governed by Section 5c of the Bankruptcy Act which contains no disenfranchising provisions or by Section 44a thereof and whether limited partners fall within the disenfranchised category set forth in Section 44a even though they are not specifically enumerated. Respondents urge instead, that the question

presented by the Petition is moot and that, in any event, the decision below is correct because the limited partners are not creditors.

The Court below did not, of course, hold that the question was moot even though the facts as they then existed relative to mootness are no different than they are today. So also, respondents argued to the Court of Appeals that petitioners are not creditors, yet that Court treated petitioners as creditors but ruled that even so they were disenfranchised by Section 44a just as stockholders are thereby disenfranchised even though they are also creditors of a bankrupt. Indeed, Section 44a is applicable only to persons who are creditors. It bars creditors from voting if they have some sort of disqualification. The ruling below thus was that the petitioners were creditors but were debarred from voting because of their status as limited partners.

Respondents thus urge reasons for the denial of the Petition here on grounds which were not accepted by the Court below itself as the basis for its decision.

In any event, respondents are in error in both of their contentions.

I

The Question Presented By The Petition Is Not Moot

In support of their contention, respondents refer to alleged facts in connection with the subsequent election of Charles Seligson as trustee in bankruptcy of Ira Haupt & Co. (hereinafter "Haupt") which are not in the record now before this Court. Respondents rely in this connection upon statements in another District Court decision (240 F. Supp. 10), the order with respect to which is itself presently on appeal to the Court of Appeals for the Second Circuit (a fact which is not adverted to by respondents).

The election in which petitioners here were disqualified from voting their claims as creditors was held during the

pendency of the Chapter XI proceedings of Haupt pursuant to Section 338 of the Bankruptcy Act. In that election the candidates were Glickman and Feldman. Glickman received the five subsequently disqualified votes (involving claims of $1,795,861.15) of petitioners, as opposed to the single vote (involving a $19,000 claim) which the Referee treated as sufficient for the nomination of Feldman (30b-34b). Thus, if petitioners were improperly disenfranchised, Glickman would have had a majority in number and amount of claims and was the properly nominated trustee. Bankruptcy Act, § 56a..

The Referee, having disenfranchised petitioners, felt it unnecessary to pass upon certain claims (primarily those of various banks) voted for Feldman, to which claims petitioners had formally raised various objections. For example, it was contended that the banks had received preferences and therefore could not vote (A38, A43-A44). If those objections are upheld by the Referee, and it must be assumed that they will be for purposes of respondents' mootness argument, petitioners' votes must be regarded as having nominated Glickman as trustee in the Chapter XI proceeding.

If petitioners were not disqualified and if Glickman was nominated, Section 338 of the Bankruptcy Act requires that he be appointed trustee in bankruptcy in the Haupt bankruptcy proceedings. For Section 338 provides that

> "the creditors . . . *may* nominate a trustee who *shall* thereafter be appointed by the court in case it shall become necessary to administer the estate in bankruptcy . . ." [emphasis added].

This Court has noted the mandatory requirement of such a use of the word "shall", stating that

> ". . . The word 'shall' is 'ordinarily the language of command.' . . . And when the same Rule uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. . . ." *Anderson* v. *Yungkau*, 329 U. S. 482, 485 (1947).

Respondents' purported authorities (Opp. Br. 5) do not contradict the foregoing principles. Indeed, respondents miscite Collier, which states without equivocation that where, as here (A29, A33),

> "the debtor was adjudged a bankrupt at the time of the order directing bankruptcy, . . . the trustee nominated under § 338 *must be* appointed trustee. . . ." [Emphasis added] 8 COLLIER, BANKRUPTCY ¶5.49[12.2], pp. 781-782 (14th ed. 1964).

Moreover, respondents' citation of *In re Dejay Stores, Inc.* is not in point. There, neither candidate for nomination as trustee in the Section 338 election had "obtained the requisite majority in both number and amount of those creditors present and voting", 220 F. Supp. at 498, and it was thus held that the creditors were entitled to elect, rather than have the Referee in the first instance appoint, a trustee after it was directed that the bankruptcy proceed. The instant case is distinguishable in that if petitioners' votes had been properly counted, a trustee (*viz.*, Glickman) was actually nominated in the Section 338 election.

Since Section 338 requires appointment of the trustee nominated thereunder, there can be no doubt that, if Glickman were nominated at the election held thereunder, Seligson's subsequent purported election is void. Moreover, respondents' reference to Seligson's ability and petitioners' alleged recognition thereof—a recognition which does not in fact exist, since petitioners subsequently challenged the adequacy of Seligson's administration before the Referee—is irrelevant. If Glickman was nominated in the Section 338 election, the best qualifications on the part of Seligson would not allow him to usurp Glickman's office as trustee contrary to Section 338. Noteworthy in this connection is the fact that the record discloses no defect whatsoever in Glickman's own qualifications as trustee.

Finally, it should be noted that Seligson was elected trustee in bankruptcy in the subsequent bankruptcy proceedings on the basis of the votes of 9 former employees of

Haupt whose claims totalled $153,944.25. The limited partners were there held to be disenfranchised on the basis of the decision in this case. Respondents do not advert to the fact that an appeal is pending as to the right of the 9 former employees to vote on the ground that they were not creditors. So also, respondents do not disclose that the claims of the banks and of the Exchange which were voted for Seligson were objected to on numerous grounds which were not tried because the Referee deemed it unnecessary so to do since he had disqualified the limited partners on the basis of the decision herein and therefore had ruled Seligson elected by the votes of the 9 former employees.

II

Petitioners Are Creditors Of The Bankrupt

All the decisions below treated petitioners as creditors of Haupt, but justified—erroneously, as the Petition shows—their disenfranchisement on the ground that they fall within a class of creditors who are barred from voting for a trustee in bankruptcy by Section 44a of the Bankruptcy Act (8b-12b, 20b-21b, 32b). Respondents here go further, arguing that petitioners were not even creditors. That argument is in error for several reasons.

1. Three of petitioners—Klebanow, Lewis and Sloan—were the original petitioning creditors who had Haupt adjudicated a bankrupt, pursuant to Section 59b of the Bankruptcy Act (23b). Their right to petition, as creditors, for a bankruptcy adjudication was necessarily upheld by the affirmance by the Court of Appeals of the District Court's denial (A33) of a motion by Haupt to stay the adjudication of bankruptcy. *Ira Haupt & Co.* v. *Klebanow*, 348 F. 2d 907 (2d Cir. 1965).

The term "creditors" as used in Section 59b is the same as that used in Sections 5c and 44a, and includes anyone who "owns a debt, demand or claim provable in bank-

ruptcy", Bankruptcy Act, § 1(11). Since the Court of Appeals has held it appropriate to proceed with the adjudication where three of petitioners were the petitioning "creditors", it necessarily follows that they, and the other petitioners here (having similar claims), must be regarded as "creditors" for other purposes of the Bankruptcy Act, including Sections 5c and 44a.

2. The major thrust of respondents' argument is that petitioners' claims are for their capital investments as limited partners in Haupt and that such claims are subordinate to other creditors' claims. Even if such a sweeping characterization were treated as accurate, petitioners are still creditors of Haupt, for the fact that a claim is subordinated does not mean that its owner ceases to be a creditor under the Bankruptcy Act. *Goldstein* v. *Wolfson*, 132 F. 2d 624, 626 (2d Cir. 1943). The *Goldstein* case is consistent with the holding that a limited partner has "a debt claim" against the assets of the limited partnership for his contribution and profit share "subject to the claims of general creditors who are not limited partners," *Alley* v. *Clark*, 71 F. Supp. 521, 525, 528 (E. D. N. Y. 1947).

Moreover, respondents missate when they claim that "petitioners seek only a return of their capital investment in Haupt" (Opp. Br. 8). As already noted in the Petition (8-9), each petitioner has not only a claim for his contract capital (*i.e.*, his capital investment in Haupt), which was at the risk of the business, but also as a customer creditor for securities, over and above his contract capital, which were on deposit with Haupt and which were not at the risk of the business.* Petitioners' claims as customer

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* Respondents attempt to dispose of petitioners' claims as customer creditors by urging that such claims "are based solely on their capital investments allegedly in excess of the requirements of the Haupt partnership agreement" (Opp. Br. 6). There is no support in the record for such assertion and it is not correct. In any event, their argument misses the point that, to the extent that the market value of a limited partner's securities plus his cash contribution exceeded his contract capital, he was free to withdraw that excess value at any time (see Art. 33(3) at A 47).

creditors amount to $223,679.97 (See A 48, which is typical of the proof of claim filed by each petitioner, and 31b), an amount in itself sufficient to nominate Glickman as against the $19,000 claim allowed by the Referee on behalf of Feldman. With respect to such claims, it has been noted that

> "a creditor of a firm who is also one of its partners, should not for that reason be deprived of the right to vote for trustee in the firm's bankruptcy." 3 COLLIER, BANKRUPTCY ¶56.03, pp. 50-51 (14th ed. 1964).

3. Respondents did not raise any objection to petitioners' claims in the Section 338 election here under review on the ground that petitioners are not creditors of Haupt. Respondents objected to the voting of claims by the limited partners only on the basis of the disenfranchisement language of Section 44a and, indeed, recognized that petitioners were creditors at least with respect to claims as customer creditors (A 41-A 43). It is now too late for assertion of the additional objection, because had it been timely raised petitioners would have been entitled to introduce proof of their status as creditors. 3 COLLIER, BANKRUPTCY ¶57.18[5], pp. 269-270 (14th ed. 1964); *cf.* Rule 46, F. R. Civ. P.; 5 MOORE, FEDERAL PRACTICE ¶46.06, pp. 1902-1905 (2d ed. 1964). For example, with respect to petitioners' claims as customer creditors, they could have proved that they actually had, during the term of the Haupt partnership and prior to November 1963, extensively traded in the securities involved.

4. Respondents have been led into error by their refusal to appreciate the dual nature of limited partners such as petitioners. Thus, such partners are both investors and creditors. See *Matter of Price, McCormick & Co.*, 171 N. Y. 15 (1902). With respect to their capital contributions, they are both investors and creditors, albeit as such creditors subordinated by the partnership agreement and such statutory provisions as Sections 105 and 112 of the New York Partnership Law, to claims of other, non-partner, creditors. With respect to other claims, such as those relative to their

securities as customers, limited partners can be and are creditors and permitted, as noted in the Petition (9), by such statutory provisions as Section 5g of the Bankruptcy Act and Section 102 of the New York Partnership Law to be treated *pro rata* with other like creditors with respect to such claims. The language of Section 102(1)(b), cited by respondents (Opp. Br. 6), does not change that result, for it is designed to do no more than prohibit limited partners from receiving payment *in preference* to other creditors.

Respondents' authorities are inapposite. For example, *Klebanow* v. *New York Produce Exchange,* 344 F. 2d 294 (2d Cir. 1965), cited by respondents (Opp. Br. 7), held on a motion to dismiss the complaint only that Haupt limited partners had standing to sue derivatively for an antitrust violation damaging Haupt. The motion did not involve the claims of such partners as *creditors* (which claims were involved and sustained in *Ira Haupt & Co.* v. *Klebanow, supra*), and the decision can not be read as affecting such claims.

Conclusion

For the reasons stated herein and in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Bankruptcy Act, Section 338

At such meeting the creditors may appoint a committee, if none has previously been designated or appointed under this Act, and, if a trustee has not previously been appointed, may nominate a trustee who shall thereafter be appointed by the court in case it shall become necessary to administer the estate in bankruptcy as provided under this chapter.